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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 708.

FANCHON & MARCO, INC.,

Petitioner,

vs.

PARAMOUNT PICTURES, INC., *et al.*,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

October Term, 1952

No. 708.

FANCHON & MARCO, INC.,

Petitioner,

vs.

PARAMOUNT PICTURES, INC., *et al.*,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

The Petition Does Not Present a Case Requiring or Deserving a Review by This Court Before a Hearing or Judgment by the Court of Appeals.

An appeal in this case by petitioner has been docketed in the Court of Appeals for the Ninth Circuit; briefs have been filed and the matter is ready for argument there. At this point petitioner has invoked this Court's admitted but wisely self-restricted power to by-pass the Court of Appeals by granting certiorari before judgment therein. The petition nowhere sets forth any reason purporting to justify this request, involving as it does

"a power not ordinarily to be exercised," and then only "for some compelling reason of wise judicial administration." (*The Three Friends,* 166 U. S. 1, 49; Frankfurter, J., concurring in part and dissenting in part in *Stainback v. Mo Hock Ke Lok Po.,* 336 U. S. 368, 384.) We submit that no such reason exists.

This is a purely private lawsuit involving primarily contested questions of fact. It presents no issues of important constitutional significance or imperative national concern, the existence of which have impelled this Court to forego the benefit of a Court of Appeals review in a limited number of cases. *Cf., Youngstown Steel Co. v. Sawyer,* 343 U. S. 579 (nationwide steel strike); *United States v. United Mine Workers,* 330 U. S. 258 (nationwide coal strike); *Ex parte Quirin,* 317 U. S. 1 (military trial and sentence of Nazi saboteurs); *Carter v. Carter Coal Co.,* 298 U. S. 238 (constitutionality of Bituminous Coal Act); *Railroad Retirement Board v. Alton R. Co.,* 295 U. S. 330 (constitutionality of Railroad Retirement Act); *Norman v. B. & O. R. Co.,* 294 U. S. 240 ("Gold Clause" cases); *The Three Friends,* 166 U. S. 1 (political and diplomatic relations with Spain just prior to the Spanish war); see *Robertson and Kirkham, "Jurisdiction of the Supreme Court of the United States,"* Sec. 131, pp. 234-237. There is no call here to interfere with the ordinary and orderly processes of judicial review.

On the other hand, the nature of this case makes such processes eminently desirable. Petitioner's stated reason for allowance of certiorari is the existence of a conflict

between the decision of the District Court and the decision in *United States v. Paramount,* 334 U. S. 131. Petitioner grounds the existence of such conflict upon the claim that this case was decided "on facts almost identical with those in the *Paramount* case." (Pet. 17.) Petitioner's statement of what the instant facts are, upon which such claim of conflict must be based, is a far cry from the facts which the evidence showed and the District Court fund. We respectfully submit that this Court should not dispense with the benefit of a careful judicial review by the Court of Appeals of the ten-volume printed transcript of 4108 pages and the 227 exhibits constituting the record of a seven-weeks' trial. This Court is entitled to the Court of Appeals' appraisal of the facts disclosed by the voluminous record and of the law as applied thereto. We are convinced that such review and appraisal will amply demonstrate the absence of any conflict between the decision here and that in the *Paramount* case or in any other case, and thus obviate further proceedings. We submit that this is a case in which such review ought to go forward and that this Court should deny the petition on the ground that the application has been made prior to judgment by the Court of Appeals. (*Saxe v. Anderson,* 302 U. S. 688.)

II.

Contrary to Petitioner's Statements, the Evidence Shows That Theatre Ownerships and Distribution Practices Have Changed Substantially Since 1945, the Date as of Which the Findings Were Made in United States v. Paramount. The Findings of the District Court That in 1949, 1950 and 1951 Respondents Have Not Engaged in Monopolistic or Conspiratorial Practices in the Distribution and Exhibition of Motion Pictures in the Los Angeles Area Are Supported by Substantial Evidence and Are Clearly Correct.

The facts as stated in the petition are in many respects at variance with the evidence and the Trial Court's findings. [R. 171-200.] By misstatement of some facts, by only partial statement of others, and by lifting quotations out of context, particularly with respect to certain remarks of the Trial Court, the petition creates an entirely erroneous impression of the Record. Space limitations of this brief make it impossible to call attention to every erroneous or unfair statement in the petition.

Petitioner was the operator of a circuit of theatres,—3 in Los Angeles and 25 in St. Louis. It was closely associated with corporations which operated 13 other theatres in and about Los Angeles. Petitioner and those corporations had officers, directors and stockholders in common and were represented by the same individuals in the licensing and booking of pictures. [Exs. A and B, R. 805; 384, 386, 783-784, 787, 986, 1098, 3287-3291, 3648-3650.]

Respondents (using the names under which they are commonly known) are Paramount, Loew's, RKO, Universal, United Artists, Twentieth Century-Fox and Fox

West Coast. Neither Columbia nor Warner Bros. was a party to this action at the time of trial.

On August 10, 1949, petitioner opened the Baldwin Theatre. The Baldwin is a neighborhood theatre in a new subdivision project on the northerly slopes of the Baldwin Hills, an undeveloped area near the fringe of the urban core of Los Angeles. There are a few business establishments in the vicinity of the Baldwin,—a market, some small shops and a drive-in restaurant, but there is also much vacant property in the area. [R. 2875-2878, 2900, 2904-2905, 2918-2919, 2555, 2457, 3259-3260, 2877, 2915; Ex. 29A, R. 1187; Court's Ex. 1, R. 423.]

A. Licensing of First Runs.

Petitioner complains of the refusal of respondents Paramount, Loew's, RKO, Universal, United Artists and Twentieth Century-Fox to license pictures first run to the Baldwin and contends that their refusals were the result of conspiracy,—a continuation of the same national conspiracy as was found in *United States v. Paramount,* to have existed in 1945. [Findings of Feb. 8, 1950, Ex. 47, R. 1595.] Petitioner contends that "precisely the same practices, acts, ownerships and relations have continued without interruption." (Pet. 2-3.) The evidence and the Trial Court's findings based thereon show that petitioner's contentions are without merit.

The evidence clearly shows how each distributor, acting individually, licensed its pictures first run since the opening of the Baldwin Theatre, and why it followed a particular practice. Petitioner states "Only for theatres owned by corporations controlled by respondents have licenses for the first exhibition of pictures at Los Angeles been granted by distributors" and that respondent

distributors enforced "a limitation of first runs to their controlled theatre corporations" (Pet. 5, 13), thus seeking to create the impression that all of respondent distributors engaged in a continuing practice of licensing their pictures to theatres operated by their subsidiaries or affiliates. Both the statement and the impression sought to be created are contrary to the evidence.

Since prior to 1942 petitioner has operated the Downtown Paramount Theatre and the Hollywood Paramount Theatre. During the period involved in this action every Paramount picture, with one exception, was exhibited first run by petitioner itself exclusively in those two theatres.[1] [Ex. Z-1, R. 2311; 181-182; 781, 782; 382-383.]

Except for the first few months after the opening of the Baldwin Theatre, respondent Loew's licensed all of its pictures first run during the period involved in this action to theatres operated by one or more of the following independent exhibitors, all of which were unaffiliated with any distributor: United Artists Theatres Circuit,[2] Metropolitan Theatres Corporation, Galston & Sutton and Sherrill Corwin. Such theatres were located in Downtown Los Angeles, Hollywood and the Wilshire District. [Ex. Z-2, R. 2314, 3108-3109; 3262, 3116, 767-769.]

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[1]Prior to December 31, 1949, respondent Paramount had an ownership interest in these two theatres, but they were operated by petitioner and respondent Paramount had no control over them. On December 31, 1949, respondent Paramount's ownership interests in those theatre properties were transferred to United Paramount Theatres Corporation, an independent exhibitor unaffiliated with any distributor. [R. 2381.]

[2]Petitioner attempts to leave the inference that United Artists Theatres Circuit, to which respondent Loew's licensed some of its pictures first run, is not an independent exhibitor. United Artists Theatres Circuit never has had any connection with respondent United Artists Corporation. Since November, 1949, it has been an independent unaffiliated operator of a circuit, just as petitioner is an independent unaffiliated operator of a circuit. [R. 3495.]

During the period involved in this action RKO licensed most of its pictures first run to the RKO Hillstreet in Downtown Los Angeles and the Pantages Theatre in Hollywood. Both of these theatres were operated by RKO until December 31, 1950, at which time they were transferred to RKO Theatres Corporation, an independent exhibitor unaffiliated with any distributor. [Ex. Z-3, R. 2316, 3297; 3316-3317.]

During the period involved in this action Universal licensed its pictures first run to the United Artists Theatre in Downtown Los Angeles and to theatres in Hollywood and the Wilshire District. It also licensed pictures to the Studio Theatre near Universal City, and sometimes to the Culver Theatre in Culver City. Since December, 1949, the United Artists Theatre has been operated by United Artists Theatres Circuit, an independent. The other theatres (and the United Artists Theatre prior to December, 1949) were operated by Fox West Coast, a subsidiary of Twentieth Century-Fox. [Ex. Z-4, R. 3402-3404, 3107, 3116, 3495, 1460.]

Prior to May, 1950, respondent United Artists (not connected in any way with United Artists Theatres Circuit) licensed its pictures first run in three theatres operated by an independent exhibitor unaffiliated with any distributor.[8] These theatres were located in Downtown Los Angeles, Hollywood and the Wilshire District. In May, 1950, this independent exhibitor changed its policy and was no longer desirous of playing United Artists pictures first run. Thereafter United Artists obtained first run playing time in whatever theatres it could interest

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[8]Although respondent United Artists had a landlord interest in these theatre properties, the theatres themselves were operated and controlled by independent exhibitors. [R. 2198, 767-769, 3077.]

in its pictures in Downtown Los Angeles and Hollywood. A number of its pictures were licensed first run to the Downtown Paramount and the Hollywood Paramount, operated by petitioner. [Ex. Z-5, R. 2318; 3530-3534; 3495; 767-769; 2198; 3502-3504.]

Thus, it is not a fact that first runs were confined to theatres operated by subsidiaries or affiliates of distributors. Many first runs were licensed to independent exhibitors.

Respondent Twentieth Century-Fox, to which the judgment of February 8, 1950, in *United States v. Paramount* was applicable,[4] acting independently, continued thereafter and during the period involved in this action to exhibit its own pictures first run in the theatres operated by Fox West Coast, its wholly-owned subsidiary, but that was pursuant to a right expressly recognized and reserved to it in that judgment. Paragraph V of the judgment of February 8, 1950, stated:

> "Nothing contained in this decree shall be construed to limit, in any way whatsoever, the right of each major defendant bound by this decree, during the three years allowed for the completion of the plan of reorganization provided for in Section IV, to license, or in any way to provide for, the exhibition of any or all of the motion pictures which it may at any time distribute, in such manner, and upon such terms, and subject to such conditions as may be

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[4]Petitioner stated that "A final judgment against the Fox defendants in the government suit was not entered until June 7, 1951." (Pet. 7 and 11.) The statement is in error. A final judgment was entered against the Fox defendants on February 8, 1950. [Exs. 47 and 48; R. 1595.]

satisfactory to it, in any theatre in which such defendant has a proprietary interest, either directly or through subsidiaries." [Ex. 48.]

Since vertical integration is not illegal *per se* (*United States v. Paramount,* 334 U. S. 131, 173), the fact that respondent Twentieth Century-Fox favored its own theatres as first run outlets in accordance with a right so to do expressly recognized and preserved in the judgment in the government case is not evidence of conspiracy or monopoly. (*Dipson Theatres v. Buffalo Theatres* (2nd Cir.), 190 F. 2d 951, 960, cert. den. 342 U. S. 926.)

B. Licensing of Subsequent Runs.

Since 1945, the date as of which the findings were made in *United States v. Paramount* after remand [Findings of Feb. 8, 1950, Ex. 47; R. 1595], there have been many changes in the methods of the respective distributors in distributing motion pictures in the Los Angeles area. Not only have first runs been frequently licensed to independent exhibitors, but the method of licensing subsequent runs has undergone profound changes. If there ever was a fixed system of runs and clearances in the Los Angeles area, it had ceased to exist by the time petitioner's Baldwin Theatre opened on August 10, 1949. Each of respondent distributors has made its subsequent run pictures available to any theatre which desired them, regardless of past relationship or ownership. [Ex. AW, R. 2637; Ex. AX, R. 2653; Ex. AY, R. 2654; Ex. BR, R. 3381; Ex. BU, R. 3417; Ex. BI, R. 3129; R. 2469-2472, 2637-2662, 3317-3319, 3380-3381, 3417-3422.] The

Trial Court summarized these changes in its opinion. [R. 159.] Remarking on these changes, the Trial Court said:

> "Consequently, we are not confronted with a situation that is static, or is brought about by design or concert on the part of the defendants to keep it so by illegal means. We are met with a situation which is *in flux* and which must be considered, not in the light of what the particular defendants may have done before the courts interdicted certain of their practices, but in the light of what they have done since and are doing today." (Italics ours.) [R. 162.]

C. Changes in Theatre Ownership of Fox West Coast.

With respect to the theatre ownerships of respondent Fox West Coast, the record shows that numerous changes occurred between 1945 and the date of the opening of the Baldwin Theatre. Petitioner makes many inaccurate and incorrect statements with respect to the theatre ownership of Fox West Coast. The record shows that between December 31, 1946, the date of the Trial Court's first decision in *United States v. Paramount* [R. 3074, Ex. BG], and the date of trial in the case at bar, the number of Fox West Coast theatres in Los Angeles County was reduced from 131 to 91, a reduction of about 33%. The Trial Court was sufficiently impressed with the diminution in size, power and number of theatres operated by Fox West Coast following the divestiture orders in the decree of December 31, 1946, that he devoted several pages of his opinion to this evidence. [R. 158-162.]

D. Reasons for Licensing First Runs in Downtown Los Angeles, Hollywood and Sometimes the Wilshire District.

All of the distributors licensed their first runs to theatres in the Downtown and Hollywood areas of urban Los Angeles. Some, but not all, of the distributors, such as Loew's (for a time), Twentieth Century and Universal, regarded the Wilshire District as being of such importance as an urban center that they sought an additional first run outlet in the Wilshire District. [Ex. Z-2, R. 2314; Ex. Z-4, R. 2317; R. 1218-1219, 812-814.]

The two great centers of urban Los Angeles are Downtown Los Angeles and Hollywood. [R. 2878-2880.] The geographical and population characteristics of Los Angeles and the importance of that city in the motion picture world make it essential that every distributor show its pictures first run in the two great urban centers —Downtown Los Angeles and Hollywood Boulevard. There was no dispute about this. Marco Wolff, Vice-President of petitioner, testified:

> "Q. Leaving aside the so-called class pictures,[5] it is good business policy, is it not, Mr. Marco, in

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[5]"Class" or "art" pictures are pictures which appeal to a special segment of the population,—usually the so-called "intellectuals." They are given special treatment. It has been found that the best results are obtained if they are played first run in one small theatre for a long period of time. Certain small theatres such as the Four Star and the Beverly Canon (operated by independent exhibitors), and the Fine Arts (operated by Fox West Coast), have built up a reputation of playing these intellectual type pictures and the proper distribution of such pictures requires that they be licensed first run to a theatre of that type. "The Magnificent Yankee," depicting the life of Mr. Justice Holmes, is a good example of a "class" picture and it was played first run in the Four Star Theatre. The Baldwin, by reason of its size, type and location, was unsuitable as an "art" theatre. [R. 2397-2400, 3127, 818.]

the ordinary class or run of pictures, that those pictures should be exhibited at least in Hollywood and downtown? A. Which pictures?

Q. The ordinary run of pictures. A. Yes, it is good business.

Q. It is important that they should be exhibited in those two areas, is it not, to be successful pictures? A. I would say so.

* * * * * * * *

Q. And because of the importance of Hollywood, particularly, and Los Angeles in the film world, it is important to the success of pictures that they get shown in those two places, isn't it? A. I think so." [R. 818, 819.]

The reasons for playing pictures first run in the Downtown and Hollywood areas are fully set forth in the evidence. [R. 2371-2372, 2378-2379, 2627-2628, 3125-3126, 3297-3298, 3407.] The theatres in those areas are located in great business and shopping centers. These centers with their important stores, fine hotels and restaurants, intriguing window displays and bright lights, generally attract crowds. That is the reason there are so many theatres, most of them of a de luxe character, clustered in these two areas. There is much pedestrian traffic passing them. [R. 3126.] They are able to operate matinees, as well as evening performances. [R. 2376-2377.] The reason that they are able to operate matinees is that these important shopping centers attract large daytime crowds that drop in to the theatres for the matinee.

The persons who patronize the Downtown, Hollywood and Wilshire District theatres come from all parts of the Los Angeles metropolitan area and if a picture is well

attended in the large de luxe theatres in those urban centers, its reputation spreads by word of mouth throughout the entire area. [R. 2428, 3298.] Thus, as the picture plays through successive runs, thousands of patrons will be waiting to see the picture in their neighborhood houses at lesser prices and at more convenient times, their interest having been stimulated by the "showcase" exhibitions in the great Downtown and Hollywood theatres. In order that the "showcase" runs may be successful (and thus "establish" the picture for subsequent runs) large sums are expended by the distributors for advertising, sometimes in excess of the returns received from the "showcase" exhibitions. [R. 2371, 3230.]

There are other reasons why it is essential that first runs be played Downtown and in Hollywood. The Los Angeles area is the motion picture capital of the world. The first run showings here are "covered" by columnists and feature writers whose observations and reviews are published nationally. Unless the first run showings are well attended and successful, adverse publicity on a national scope might follow. And, to the contrary, successful first runs in this area commend favorable publicity on a national scope. [R. 2371.]

Furthermore, the showcase theatres pay large film rentals and they can afford to pay such rentals because they have the right to play the first runs with clearance over other theatres in the competitive area. [R. 2371.] All of Los Angeles County, except the Long Beach-Wilmington-San Pedro area and the Pomona area, is competitive, on a first run basis, to Downtown Los Angeles and Hollywood. That is to say, people from all of Los Angeles County (with those exceptions) attend the great showcase theatres in the two

principal metropolitan entertainment centers, Downtown Los Angeles and Hollywood. [R. 2435-2436.] There may not be great numbers from any one area of the county, but altogether the suburban areas contribute a substantial portion of the patronage of the showcase theatres. [R. 3244-3245.] Petitioner's answers to interrogatories and Marco Wolff's testimony are in accord with these statements. [R. 3652, 904-907.] It is a principle of economics in the business of distributing motion pictures recognized by all (including Marco Wolff) that the earlier the run, the greater the area of competition. [R. 907.] Thus, the area of competition for first run is almost county-wide whereas the area of competition for subsequent runs is smaller. [R. 907, 916-918.] The result of these "facts of life" in the business of distributing motion pictures is that the licensing of additional first runs in the competitive area tends to dilute the patronage of the "showcase" theatres, which, in turn, decreases their ability to pay large film rentals and to contribute toward the extensive advertising and exploitation a picture receives on its first release.

In addition to the many theatres clustered in the Downtown and Hollywood areas (and to a lesser extent in the Wilshire District) there are a large number of other theatres in the Los Angeles urban area, as well as in the surrounding suburban communities. These theatres are scattered, not grouped, because each is necessarily located to provide for the theatre patrons in its own segment of the entire Los Angeles urban area and is dependent upon those patrons for its success. We say "necessarily" because these segments of urban Los Angeles entirely lack the elements possessed by the Downtown, Hollywood and Wilshire areas which draw people to them from all sec-

tions of the Los Angeles metropolitan area regardless of the theatres. In the Downtown, Hollywood and Wilshire Districts the theatres undoubtedly *enhance* the inflow of people, but they did not and do not *create* it. People come from great distances, drawn by the individual and combined attraction of stores, hotels, restaurants, amusements and bright lights. To the contrary, the Baldwin Hills area, as such, presents no magnetic attraction whatsoever. Such few business establishments as exist in the vicinity of the Baldwin Theatre exist for the convenience of the inhabitants of the immediate neighborhood.

A "neighborhood theatre" such as the Baldwin is generally unsuitable as a "showcase" to "establish" a picture and cannot be expected to produce revenues comparable with theatres in the Downtown, Hollywood or Wilshire Districts. Such a theatre starts with an insurmountable handicap of location. It must, alone and unaided, draw patrons to otherwise unimportant and unimpressive surroundings; whereas, the theatres in the major urban centers need only to capitalize upon the natural desire of the public to "see the town."

It was for these, and other valid business reasons thoroughly demonstrated by the evidence, that the majority of the distributors, acting individually, required that their pictures receive first run exhibition in the Downtown and Hollywood areas (and on occasion in the Wilshire area) and refused to dissipate their value by exhibiting them on that run in neighborhood theatres.

We do not conceive it to have been the purpose of this Court in *United States v. Paramount* to require the defendants to jettison sound business judgment in selecting the means for best exploiting and selling their pictures,

to ignore the undisputed economics of motion picture distribution and, like a public utility, to license their product to any theatre making demand, regardless of location, appointments, financial responsibility or reputation for showmanship. Yet that in its final analysis is the predicate upon which the Petition before the Court proceeds and upon which petitioner concludes that the decision and opinion of the District Court conflicts with the opinion of this Court. The Baldwin Theatre was denied first run; ergo the defendants have violated the antitrust laws.

Experience has demonstrated and common sense dictates that a sequence of exhibition of a picture in an area, first in large, centrally located theatres and subsequently in local and suburban theatres enables more people to see it, at times which suit them, at prices which they can afford and at theatres in their own locality. This "staggered distribution" referred to by the trial judge in his opinion inevitably necessitates that some theatres be preferred as to run over others. The selection of large, centrally located Downtown, Hollywood and Wilshire District theatres for their initial releases in preference to more remote neighborhood theatres can hardly be condemned as illegal; but if it were the Baldwin Theatre has no claim to preference of treatment over other similarly situated neighborhood theatres. In fact, as the evidence showed and the trial judge observed, the Baldwin Theatre was "notoriously a 'bad' producer of revenue in the 21-day group." [R. 158.]

E. Clearance of First Runs Over Subsequent Runs.

Petitioner states that "three clearances have applied in favor of first run against the second run theatres—7, 14, and 21 days," and that second run theatres are "classified" as to these clearances with the clear inference that such "classification" is arbitrarily manipulated to favor Fox West Coast and to relegate the Baldwin to the lowest position in the scale. (Pet. 5-6.) Petitioner's statement and the inferences therefrom are erroneous and highly misleading as demonstrated by the record and findings.

Petitioner constructed its Baldwin Theatre within the urban core area of Los Angeles, from which area the showcase theatres may be expected to draw their greatest patronage. The earliest availability after first run afforded any of the theatres in that area, a number of which are larger and as fine as the Baldwin, is 3 weeks or 21 days. Every distributor offered the Baldwin such availability, equivalent to the best offered other theatres in the same urban area whether operated by Fox West Coast or by independents. By petitioner's own testimony that availability and the consequent clearance given first run was entirely reasonable and in accordance with the requirements of *United States v. Paramount.* Harry Arthur, Jr., President of petitioner, admitted that a 21 day clearance for the Baldwin Theatre was "not unreasonably long." It was his view that even a longer clearance in favor of the first run theatres would be reasonable. His testimony is quoted in the Trial Court's opinion [R. 153-156] and can also be found in the Transcript. [R. 3548-3555.]

reasonable grounds, similar situations in a similar manner." [Findings 15, 22 and 26; R. 187, 192, 194.]

On the issue of conspiracy, respondents introduced evidence explaining why each respondent distributed pictures in the manner shown by the evidence and denying that the manner of distribution followed was the result of conspiracy. Petitioner states "The men who made the denials were, as to licensing motion pictures, hardly more than glorified correspondence clerks." (Pet. 22.) Petitioner's statement is contrary to the evidence. For Paramount, Loew's, RKO, Universal and Twentieth Century-Fox, the Western Sales Managers testified. They were the executives in charge of distribution in the Western States. Two had their headquarters in New York; the other three had their headquarters in Los Angeles. These executives not only were the executives who knew why the particular distributor licensed pictures as it did in the Los Angeles area; they were the men who decided what availability should be accorded to the Baldwin. They testified why they had reached their decisions and the reasons given by them had nothing to do with conspiracy or agreement. They were business reasons—reasons which grew out of the obligations imposed by the decisions in *United States v. Paramount* and out of the economics of the distribution of motion pictures as applied to the geographical situation, population habits and physical facts in the Los Angeles area. In some instances the decisions of these executives were subject to approval of lawyers and other executives. But in no instance was the judgment of the other executives substituted for the judgment of the executives who had studied the situation, knew the facts and reached a considered conclusion as to what his company should do. These

executives denied joint action. But more persuasive than these mere denials are the reasons which they gave for their decisions and the correspondence written before there was any lawsuit, which shows beyond any reasonable doubt that the determinations made by the respective distributors as to the playing position to be accorded the Baldwin were made individually, in each instance, for legitimate and even compelling business reasons. Their whole course of conduct and the legitimacy and reasonableness of the decisions which they reached show beyond any reasonable doubt that conspiracy, agreement and concert of action were not involved.

The decision in *Interstate Circuit v. United States,* 306 U. S. 208, has no application to the case at bar. There, Interstate Circuit made most extraordinary demands upon the branch managers of the distributor-defendants. These demands were not considered or acted upon by the branch managers, but were referred to executives for decision. The distributor-defendants uniformly agreed to the demands and from this uniformity in what was considered an unreasonable position, the lower court inferred conspiracy. Defendants did not offer any explanation of "the singular unanimity of action on the part of the distributors" (p. 223). No one who had anything to do with the distributors' decisions on the Interstate Circuit demands was called as a witness. The Supreme Court held that *in the absence of any reasons* why the defendants, acting individually, would unanimously agree to such extraordinary demands as were presented by Interstate Circuit, the Trial Court was justified in inferring that defendants acted by agreement and that this inference was supported and strengthened by the fact that the distributors failed to call any witness who

knew, or was in a position to know, whether any agreement had been reached among them for concerted action (p. 225). In the case at bar, the reasons for the individual acts of the distributors were fully explained by executives who made the decisions.

III.

If the Judgments in United States v. Paramount Constitute Prima Facie Evidence of Conspiratorial Action Against the Baldwin Theatre, Such Prima Facie Evidence Was Overcome by Affirmative and Convincing Evidence.

Under Section II of this Brief we have pointed out that since the decision of the Expediting Court which was affirmed in part and reversed in part by the Supreme Court, theatre ownerships have changed, substantial changes have been made in the method of distribution, and that it cannot be said that during the operation of the Baldwin Theatre respondents maintained a fixed system of runs and clearances. In its opinion the Trial Court said that since 1945 the practices of distribution in the Los Angeles Area have been *"in flux."* [R. 162.] Addressing itself to the period involved in this action, the Trial Court found that "None of the distributor defendants has established or maintained or does now maintain a fixed or rigid system of runs or clearances in the Los Angeles area. Each distributor during the entire period since at least June 11, 1946, has, acting individually, made constant changes, increasing in number, in the availabilities and clearances over theatres in the Los Angeles Area." [R. 193.] The Trial Court based its findings upon affirmative and convincing evidence that each distributor, in determining the playing position of the Baldwin Theatre, acted individually and without conspiracy

with any other distributor or exhibitor. If the judgments in *United States v. Paramount* constituted *prima facie* evidence of conspiratorial action during the operation of the Baldwin Theatre (which we deny), the effect of those judgments was overcome by evidence which convinced the Trial Court.

Actually, such of the judgments in *United States v. Paramount* as had the effect of constituting *prima facie* evidence under Section 5 of the Clayton Act did not constitute *prima facie* evidence that the conspiracy which was found to have existed in 1945 continued to exist in 1949, 1950 and 1951, nor did they constitute *prima facie* evidence that a conspiracy existed in the Los Angeles area. Their application to the issues in the case at bar was of a limited character. In the first place, those judgments did not adjudicate that there was conspiratorial conduct in any specific city or locality. Petitioner seeks to create the impression that those judgments adjudicated that the distributor-defendants have acted in concert in their grant of runs and clearance *in Los Angeles,* in the formation of a uniform system of clearance *in Los Angeles,* and in exercising their power to fix runs and clearances *in Los Angeles* for the purpose and with the effect of excluding independents. (Pet. 8-11.) These assertions by petitioner are in error. In *United States v. Paramount* the Expediting Court did not find concert of action or establishment of a system of runs and clearances in any particular area or with respect to any particular theatres. It expressly left open the question of whether or not there was conspiratorial conduct in particular areas. The Expediting Court said in its original opinion, "The decisions of such controversies as may arise over clearances should be left open to local suits in the area concerned." (*United*

States v. Paramount, 66 Fed. Supp. 323, 342.) And when the Court made its findings in 1950, it refrained from finding concert of action or establishment of a system of runs and clearances in any particular area and continued to leave these questions open for determination in individual actions involving each local area. In the only decision of the Supreme Court which has construed the provisions of Section 5 of the Clayton Act giving *prima facie* effect to a final decree in a government suit, *Emich v. General Motors Corporation,* 340 U. S. 558 (1951), the Court expressly limited the *prima facie* effect of a prior government decree to those matters which were "distinctly put in issue and directly determined" in the prior government action. (340 U. S. at p. 569.)

In the second place, those judgments were not evidence that the conspiracy which was found to have existed in 1945, continued to exist in 1949, 1950 and 1951. The findings upon which those judgments are based expressly state that "Unless otherwise stated these findings show the situation in 1945." [Ex. 47.] All of the findings which petitioner quotes or cites speak as of 1945 (Pet. 8-10). The Trial Court noted that the judgments upon which petitioner relies spoke as of a time long prior to the opening of petitioner's Baldwin Theatre and stated:

> "* * * So we have to determine whether the practices which the decree in the Paramount case condemned, and which the plaintiffs sought to prove by evidence *aliunde,* have continued to the present time, whether they are the result of agreement, and whether the plaintiff has been damaged by them." [R. 134.]

After hearing all of the evidence relating to the period of time subsequent to the date as of which the decrees spoke, the Trial Court determined that:

> "Whatever may have been the practice of the defendants before the decree of the statutory court, it is quite evident * * * there has been an abandonment of the condemned distributing policies such as 'zoning,' 'block booking,' 'key deals,' and the like, a revision of clearances and the establishment of a system of picture by picture exploitation." [R. 147.][7]

The conduct of respondents must be viewed in the light of the changed situation in 1949, 1950 and 1951, and not in the light of the situation as it existed in 1945.

In *Emich v. General Motors,* 340 U. S. 558, plaintiff based his action upon the same acts which were made the subject matter of the prior government action, not on conduct of General Motors four or five years later. Since he relied upon the identical acts which were the subject matter of the prior government action, he was able to use the judgment in the prior government action for the purpose of minimizing the burdens of his private litigation. In the case at bar, where the acts upon which

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[7]Petitioner asserts that the distributors maintained "a structure of fixed admission prices for all of the theatres" and that it was "enforced by the distributors specifying in their licenses of pictures the minimum price to be charged by the exhibitors. on pain of immediate termination of the license, reduction in the clearance allowed, relegation of the offending exhibitor to a later run and refusal of future licenses." (Pet. 6.) Petitioner's assertions are without support in the record and are untrue. As a matter of fact, the complaint did not charge the distributors with attempting to fix admission prices and price fixing was not in issue. As the Trial Court said, "This is not a price-fixing case." [R. 163.]

petitioner relies occurred four or five years after the acts which were the subject matter of the prior government action, petitioner seeks to make use of the judgment in the prior government action by attaching to it a presumption that respondents continued to violate the anti-trust laws. This, as the Trial Court said, is not permissible. It is a well established principle of law that a party under restraint by court order will comply with that order. (*United States v. Hosteen Tse-Kesi,* 191 F. 2d 518, 520 [10th Cir., 1951]; *N. L. R. B. v. Lightner Publishing Corporation,* 128 F. 2d 237, 240 [7th Cir., 1942].) Under our system of jurisprudence, a party is not presumed to be guilty of contempt of court.

The three cases cited[8] by petitioner to the effect that a conspiracy, once established, is presumed to continue (Pet. 18) did not involve any injunction or decree of court requiring that the defendant cease the conspiracy. The one case[9] cited by petitioner to the effect that a judgment that parties have violated the anti-trust laws does not create a presumption that they have ceased the violation (Pet. 19) involved a criminal action under the anti-trust laws and did not involve any future restraint as to the defendants' conduct. Where, as in the case at bar, there was an injunction requiring respondents to cease and desist the conduct found to be in violation of the

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[8]*Marino v. United States,* 91 F. 2d 691, 695 (C. A. 9, 1937); *Coates v. United States,* 59 F. 2d 173, 174 (C. A. 9, 1932); *Hyde v. United States,* 225 U. S. 347.

[9]*Local 167 v. United States,* 291 U. S. 293 (1934).

anti-trust laws, there is no presumption that they defied the court. The presumption is to the contrary.

However, quite apart from any question of the correctness of the presumption to which the Trial Court adverted, it is readily apparent from the entire record that the Trial Court did not in fact base its findings upon the presumption. The Trial Court's findings were based upon the affirmative evidence in which witnesses for respondents testified in detail as to why they individually made their determinations with respect to the Baldwin's playing position. The findings are supported by substantial and convincing evidence which is summarized in Section II of this brief.

IV.

Petitioner Has Created an Erroneous Impression of Statements of the Trial Court by Lifting Them Out of Context.

Petitioner quotes the Trial Court as saying:

> "I don't conceive that there can be a possibility of free trade as to first run." (Pet. 12.)

Petitioner failed to quote the balance of the Court's statement showing what he meant by "free trade" and failed to quote counsel for petitioner's statement that he agreed with the Court. The entire discussion of "free trade" at that point was:

> "In other words, it is not enough for you to say that some other theatre is given a first run and you are not, because I don't conceive that there can be possibility of free trade as to first runs. In other

words, you can't say that all the theatres in Los Angeles shall have first runs at the same time.

Mr. Reich: No. With that I agree." [R. 1022.]

The nature of motion pictures is such that they must be licensed on a series of successive runs. All exhibitors cannot play the picture at the same time. Without exception every decision which has dealt with the questions of run and clearance in the distribution of motion pictures has recognized the propriety and economic necessity of licensing successive runs of pictures with a reasonable lapse of time between runs in theatres which are in substantial competition.[10] This method of licensing pictures means that some exhibitor plays first and some exhibitor plays second, and so on. [Tr. 178-179; 3229.]

In a discussion with counsel for petitioner, the Trial Court referred to the fact that some young lawyers who

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[10] *United States v. Paramount Pictures, Inc.*, 334 U. S. 131, 145 (1948);

Schine Theatres v. United States, 334 U. S. 110, 121 (1948);

United States v. Paramount (D. C. N. Y.), 66 Fed. Supp. 323, 342 (1946);

Chorak v. R.K.O. Radio Pictures, Inc. (9th Cir.), 196 F. 2d 225, 228 (1952) (cert. den. 97 L. Ed. 122);

Dipson Theatres, Inc. v. Buffalo Theatres, Inc (2nd Cir.), 190 F. 2d 951, 958 (1951);

Westway Theatre, Inc. v. Twentieth Century-Fox (4th Cir.), 113 F. 2d 932 (1940) (affirming on opinion below 30 Fed. Supp. 830, 834-835);

Gary Theatre Co. v. Columbia Pictures Corp. (7th Cir.), 120 F. 2d 891, 893-894 (1941);

Windsor Theatre Co. v. Walbrook Amusement Co. (4th Cir.), 189 F. 2d 797 (1951) (affirming 94 Fed. Supp. 388, 390).

were not economists had written articles condemning the anti-trust laws and that he himself had written an article in which he said that the goal of maintaining competition in a modern economic system could not be realized under the anti-trust laws. Petitioner quotes his statement out of context. (Pet. 11-12.) Read in context, it appears that the Trial Court's statement was as follows:

> "So the trouble with these articles is they are by young men who are not economists, who are lawyers, and they get mixed up in the economic details, which some of them do not understand. Chamberlin and all the others actually condemn the anti-trust law, as interpreted, just as your Professor Toulmin does. But I am not interested in the theory of economists. I am interested in the way the Supreme Court has interpreted it.
>
> "As a matter of fact, I can point to an article of my own, published in the Commercial Law Journal, in which I said that antitrust laws are a part of America's romantic dream, which can never be realized in modern economics and actually maintain competition in a modern industrial system. You can quote me against myself. But, as I told you, after 5:00 o'clock I can talk one way, but up to 5:00 o'clock I conform to what the law tells me to do." [R. 3978.]

As a matter of fact, Judge Leon R. Yankwich, Chief Judge of the Southern District of California, and Trial Judge in the case at bar, is an outstanding authority on

the anti-trust laws. He was a member of the committee of distinguished judges appointed by the Judicial Council of the United States to study and report on Procedure in Antitrust and Other Protracted Cases (13 F. R. D. 62). He has decided many important cases involving the anti-trust laws, including the following:

United States v. Standard Oil Co. (1948), 78 Fed. Supp. 850, affirmed 337 U. S. 293;

United States v. Richfield Oil Corp. (1951), 99 Fed. Supp. 280, affirmed 343 U. S. 922;

Balian Ice Cream Co. v. Arden Farms Co. Inc. (1950), 94 Fed. Supp. 796, 104 Fed. Supp. 796;

F. & A. Ice Cream Co. v. Arden Farms (1951), 98 Fed. Supp. 180;

United States v. Food and Grocery Bureau of Southern California (1942), 43 Fed. Supp. 974, affirmed 139 F. 2d 973;

United States v. Heating, Piping & Air Conditioning Contractors Association (1940), 33 Fed. Supp. 978.

An examination of the record, not only at the pages cited by petitioner (Pet. 11-12), but as a whole, will demonstrate that Judge Yankwich fairly and correctly applied the law to the facts and that his comments thereon were wise and appropriate. We submit that the implications created by petitioner's use of the Trial Court's comments out of context are unfair.

Conclusion.

It is respectfully submitted that no valid reason exists for by-passing the Court of Appeals, and that a review of the voluminous record will show that the Trial Court's findings are supported by substantial and convincing evidence and that they are clearly correct.

Respectfully submitted,

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